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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

DEBORAH O'GORMAN, Plaintiff and Appellant, v. CITY OF CALISTOGA, Defendant and Respondent.	A150972 (Napa County Super. Ct. No. 26-66119)

Deborah O'Gorman sued the City of Calistoga (City), alleging that she has the exclusive right to divert, sell or convey water from Kimball Creek, the headwater of the Napa River. She claimed that since 1959, the City has infringed that right by taking Kimball Creek water and providing it to City residents and various wineries. O'Gorman sought injunctive and declaratory relief, as well as over $10 million in damages. The basis of her claims is her theory that a 1939 Water Rights Agreement between her grandfather and the City, which gave the City access to Kimball Creek water on the land where the City built a dam, terminated in 1959, with the result that the rights at issue have reverted to her as her grandfather's only heir. O'Gorman claims she only recently learned of the alleged termination of the contract. O'Gorman now appeals from the trial court's grant of summary judgment to the City. We agree with the trial court that as a matter of law O'Gorman cannot prevail on her claims, and therefore we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

According to O'Gorman, in the late nineteenth century her great-grandfather, A.L. Tubbs, purchased all the riparian water rights in the Mount St. Helena watershed as it

drained from the lands surrounding Kimball Creek. The deeds reflecting those purchases provide that they were for the benefit of his heirs, assigns, and successors. When A.L. Tubbs died, the water rights passed to his son, Chapin Tubbs (Tubbs), who was O'Gorman's grandfather. By 1959, Tubbs and his wife had died, and any rights they held passed to O'Gorman's mother, whose death left O'Gorman the only surviving heir.

A. *Development of Kimball Creek Reservoir*

The following facts are undisputed: In 1938, the City applied to the California Division of Water Resources (Division) to appropriate and store water from Kimball Creek, and in about 1939 the City bought the parcel of land on which Kimball Creek reservoir is now located (Reservoir Parcel). Early in 1939, Tubbs's attorney informed the Division that Tubbs opposed the City's application, but by June of that year the attorney reported that Tubbs and the City had reached an "amicable settlement concerning the water rights of the parties in Kimball Creek." The City then entered into two agreements with Tubbs and his wife in November 1939, a Water Rights Agreement (WRA) and an Indenture.

The WRA recited that the City was in the process of building a storage dam on the Reservoir Parcel to impound Kimball Creek water "in order to provide a water supply" for the City; that Tubbs owned land and easements upstream from the dam site; that Tubbs obtained his water supply for the "Tubbs Home Place" (Home Place) which was contiguous to Kimball Creek below the dam site, from his upstream lands and easements; and that Tubbs conveyed that water supply to the Home Place by means of a two-inch pipeline that went across the Reservoir Parcel. Under the WRA, Tubbs agreed that his rights as a lower riparian user of Kimball Creek, below the dam, were made subordinate and subject to the right of the City to store and impound water in its dam and use it for its water supply, and he "forever quitclaim[ed], relinquish[ed] and release[ed]" to the City all his rights to take Kimball Creek water on the Reservoir Parcel. Tubbs retained his easement and right of way in the Reservoir Parcel to allow the use of the existing two-inch pipeline to supply water to the Home Place, and to lay additional pipe as he deemed necessary to improve and increase the transmission of that water supply. The agreement

did not prevent Tubbs from using water upstream from the Reservoir Parcel for the Home Place, except that Tubbs relinquished any right to erect dams on Kimball Creek above the Reservoir Parcel (except for a small diversion dam for filling a two-inch pipeline to supply the Home Place).[1] The City agreed to bear the cost of relocating and replacing the existing two-inch pipe on the Reservoir Parcel.

The Indenture gave the City a right of way and easement over Tubbs's property to allow the construction and maintenance of a 10-inch pipeline as part of the City's water system. Tubbs was given a perpetual right to connect to the 10-inch pipeline on his property and to take as much water as he needed for his lands at a rate not to exceed ten cents per thousand gallons, except that the City had the right to limit the amount of water Tubbs could take under certain circumstances, such as drought.

In 1940, Tubbs's attorney informed the Division that Tubbs and the City had "fully consummated all agreements with respect to the adjustment of the respective rights of the parties on Kimball creek and other matters of mutual interest," and that Tubbs was withdrawing any opposition to the City's application to impound Kimball Creek water.

B. *The Reynolds Lawsuit*

At some point before 2009, O'Gorman came to believe that the City was taking more water than the WRA permitted, and she assigned to Grant Reynolds her rights to recover from the City on a breach of contract claim. Reynolds filed suit against the City (the *Reynolds* case), alleging among other things that the City breached the WRA by using more water than the WRA allowed and by selling water for agricultural use

The City filed a motion for summary judgment or, in the alternative summary adjudication, arguing that Reynolds had no standing to sue for breach of the WRA.[2] The City argued that the WRA's covenants did not run with the land, but instead were

[1] The two-inch pipeline was damaged by fire in 1964, and was not repaired. No pipeline or other facility owned by O'Gorman or her predecessors has transported Kimball Creek water to the Home Place since then.

[2] The City also argued, and the trial court agreed, that claims based on the WRA were time-barred.

personal promises between Tubbs and the City that did not bind the land or allow enforcement by future owners.[3] Accordingly, O'Gorman had no standing as Tubbs's heir to sue on the contract, and Reynolds likewise had no standing.

The trial court agreed with the City and dismissed Reynolds's WRA-based claims. Based on its finding that the WRA's covenants did not run with the land, the court ruled that Reynolds lacked standing to bring them. The court also denied a motion by Reynolds to amend his complaint to plead inverse condemnation. Although Reynolds challenged some of the trial court's rulings on appeal he did not contest the dismissal of the contract claims or the finding that the WRA's covenants did not run with the land. (*Reynolds v. City of Calistoga* (July 3, 2014, A134190 & A135501) [nonpub. opn.].[4])

C. *The Present Lawsuit*

In the wake of Reynolds's unsuccessful WRA-based claims, O'Gorman filed this lawsuit, which relies on the previous trial court finding that the WRA covenants did not run with the land. She alleges that when the City bought the Reservoir Parcel, which was before the WRA was signed in 1939, it had been stripped of its water rights, which Tubbs's father had purchased in the 1880's. Thus, the only rights the City had for the Reservoir Parcel were those it obtained through the WRA. Because the WRA did not run with the land, it must have terminated by operation of law in 1959, when Tubbs's wife died. And when the WRA terminated, the water rights that were the subject of the WRA reverted to Tubbs's heirs by operation of law. In other words, with the termination of the WRA, the City owned "a parcel of property with a dam which supplied the City with

[3] Covenants that run with the land are contractual agreements "contained in grants of estates in real property, are appurtenant to such estates, and pass with them, so as to bind the assigns of the covenantor and to vest in the assigns of the covenantee, in the same manner as if they had personally entered into them." (Civ. Code, § 1460.) The only covenants that run with the land are those that meet certain statutory requirements. (Civ. Code, § 1461.) Although the Indenture states that the grant of right of way is a covenant running with the land, there is no such language in the WRA, which Tubbs and his wife signed on the same day they signed the Indenture.

[4] Initially Reynolds challenged the denial of his motion to amend, but he later abandoned that part of the appeal. (*Reynolds v. City of Calistoga, supra,* at p. 3, fn. 3.)

water . . . but had no rights to said water," because the rights had reverted to Tubbs's heirs. She further alleges that by adopting in *Reynolds* the position that the WRA did not run with the land, the City "repudiated" the WRA and claimed that it was "null and void." She claims that the City's "repudiation" of the WRA is tantamount to an admission by the City that it took her water rights and her water without just compensation. The end result, according to O'Gorman, is that she has inherited the exclusive right to divert, store, and sell all water from the Reservoir Parcel.

The Second Amended Complaint alleges five causes of action. The first, second and fifth are for inverse condemnation. O'Gorman seeks to recover the value of the water diverted by the City from Kimball Creek since 1959, and the proceeds the City received from the sale of that water. In the third and fourth causes of action, for declaratory and injunctive relief, O'Gorman seeks declarations that she has the sole right to sell or convey water from Kimball Creek and that all the rights the City held under the WRA have reverted to her, as well as injunctions barring the City from taking water except for the City's inhabitants, and conditioned on just compensation to her.

The City moved for summary judgment. The trial court granted the motion after a hearing, and judgment was entered for the City. O'Gorman timely appealed.

DISCUSSION

A. *Applicable Law*

1. *Inverse Condemnation*

The California and United States Constitutions prohibit the government from taking private property for public use without just compensation. (Cal. Const., art I, § 19, subd. (a); U.S. Const., 5th & 14th Amends.; *Chicago B. & Q.R. Co. v. City of Chicago* (1897) 166 U.S. 226, 239.) To prevail on an inverse condemnation claim, a plaintiff must show a property interest in the property that was purportedly taken and damages from the taking. (*City of Los Angeles v. Superior Court* (2011) 194 Cal.App.4th 210, 221.) The property interest O'Gorman claims here is "the exclusive right to divert, store and sell all water obtained from what is now the City's reservoir property."

2. *Summary Judgment*

A defendant is entitled to summary judgment "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Code Civ. Proc. § 437c, subd. (c).) "We review a grant of summary judgment de novo; we must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law." (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) We view the evidence in the light most favorable to the nonmoving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768 (*Saelzler*).) In deciding whether a material factual issue exists for trial, we "consider all of the evidence set forth in the papers, except the evidence to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence." (Code Civ. Proc., § 437c, subd. (c).)

A defendant "moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that [the defendant] is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) A defendant can meet this burden by showing that plaintiff "has not established, and cannot reasonably expect to establish," an essential element of plaintiff's claim. (*Saelzler*, *supra*, 25 Cal.4th at p. 768.)

A defendant's initial burden in moving for summary judgment is to come forward with evidence to make a prima facie showing that there is no triable issue of material fact (*Aguilar*, *supra*, 25 Cal.4th at p. 850), where the material facts are determined by the pleadings. (*Fisherman's Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 320.) If defendant meets that burden of production, the burden of production shifts to plaintiff to make a showing that there is a triable issue of material fact. (*Ibid.*) "The plaintiff . . . shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists." (Code Civ. Proc., § 437c, subd. (p)(2).) "A party cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising

a triable issue of fact." (*LaChapelle v. Toyota Motor Credit Corp.* (2002) 102 Cal.App.4th 977, 981.)

Although we review an order granting summary judgment de novo, we limit our review to the issues that are raised and supported in appellant's opening brief. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6; *Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1295 (*Provost*).) ["we will not address arguments raised for the first time in the reply brief"].)

B. *Analysis*

Based on the undisputed facts outlined above, the City argued that O'Gorman cannot establish a property interest in Kimball Creek water, and her inverse condemnation claims must fail. The City argued that, as a matter of law, the WRA permanently subordinated and quitclaimed Tubbs's water rights on and downstream from the Reservoir Parcel and that as a result, O'Gorman cannot establish any property interest in those rights, which she claims to have inherited.

O'Gorman did not dispute that Tubbs subordinated and quitclaimed water rights in the WRA. She argued that because the WRA was not a covenant running with the land, it terminated in 1959. She argued that the WRA was a temporary grant to the City of water rights, and that with the termination of the WRA, the exclusive right to store, sell and divert water from the Reservoir Parcel reverted to Tubbs's heirs.

Attempting to show a triable issue of material fact in the trial court, O'Gorman came forward with various pieces of evidence, including deeds that pre-date the WRA, evidence of the City's authorized place of use for Kimball Creek water, evidence of pre-WRA water use, and contracts by which the City sold water to wineries. We have reviewed this evidence and conclude that none of it creates any dispute with respect to the facts we outlined above, or bears on the central question at issue, which is this: do the rights Tubbs granted to the City in the WRA revert to O'Gorman as a result of the determination in *Reynolds* that the WRA was not a covenant running with the land and that O'Gorman thus lacked standing to enforce it? As we will explain, we answer that question, "no," just as the trial court did.

"The interpretation of a written instrument, even though it involves what might properly be called questions of fact (see Thayer, Preliminary Treatise on Evidence, pp. 202-204), is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect." (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.) On its face, the WRA is a permanent relinquishment of water rights to the City. The WRA states that Tubbs "forever quitclaims, relinquishes and releases" to the City "all of his rights of every kind and description to erect dams and/or impound water on and/or take water from" Kimball Creek on the Reservoir Parcel. The WRA has no termination date and specifies no term of duration. Nor does it contain a reverter clause, any language regarding a right of termination, or anything else to suggest it is a temporary grant of water rights. Nothing in the WRA suggests that the quitclaim was to be extinguished with the death of Tubbs or his wife. Accordingly, whatever water rights Tubbs held on the Reservoir Parcel were transferred to the City permanently and in their entirety.[5] And so the trial court determined in ruling on the City's motion for summary judgment. The transfer of the rights was completed upon execution of the WRA, and based on the representation Tubbs's attorney made to the Division, it appears the City fulfilled its obligations under the WRA soon after.

We are not persuaded by O'Gorman's arguments that the rights granted to the City in the WRA have reverted to her. O'Gorman's primary argument is the City is bound by its position in *Reynolds*, which she characterizes as follows: Because the WRA was not a covenant running with the land, it "no longer existed" after her grandparents' death, and the non-existence of the WRA meant that Reynolds (and O'Gorman) lacked standing to enforce it. Thus, O'Gorman claims that the City viewed the WRA as "null and void" or as having terminated, and therefore she lacked standing to enforce it. According to

[5] O'Gorman asserts that the quitclaim in the WRA was not permanent because it was not recorded in a separate document entitled "quitclaim." Because she does not support that assertion with any legal authority or reasoned argument, we treat it as forfeited. (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 (*Allen*).)

O'Gorman, the non-existence or termination of the WRA (which she pleads as fact in the Second Amended Complaint), means that the rights Tubbs granted to the City in the WRA now belong to her.

To begin, O'Gorman does not cite to anything in the record here (which includes documents from the *Reynolds* case) that supports her characterization of the City's position in *Reynolds.* She does not identify any instance of the City taking the position that the WRA "no longer existed" or had terminated, or was null and void. In fact, the City argued in *Reynolds* that the WRA was not a covenant that ran with the land, but was instead "an exchange of personal promises between the City and Tubbs which O'Gorman (and now Reynolds) had no standing to enforce."

Nor does O'Gorman cite any authority to support her view that the trial court's finding in *Reynolds* that she and Reynolds lacked standing to enforce the WRA means that the WRA is no longer in existence, or is null and void or has somehow been rescinded, or has terminated.

Even if the WRA had terminated in 1959 when O'Gorman's grandmother died, that would not mean that O'Gorman reacquired the rights that Tubbs "forever quitclaim[ed], relinquish[ed] and release[ed]." " ' "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.' " (1 Witkin, Summary of Cal. Law (11th ed. 2017) Contracts, § 955, p. 1007.) The transfer of water rights in the WRA was permanent and complete, not executory, and therefore the City retains the rights even if the WRA has terminated.

In her opening brief on appeal, O'Gorman alludes to Water Code section 1016, claiming that the trial court erroneously ignored its "impact." She fails to provide even a summary of the statute, let alone any discussion of its impact in this case. A mere reference to a statute in an appellate brief does not constitute adequate argument, and therefore we can regard the point as forfeited. (*Allen, supra*, 234 Cal.App.4th at p. 52.) Even if we reached the argument, we would reject it because it is far from clear that

Water Code section 1016 has any application here. The statute was enacted in 1999, and provides that at "the conclusion of the term of a water transfer agreement, all rights in, and the use of, the water subject to the agreement revert back to the transferor." (Water Code, § 1016, subd. (a); see Stats. 1999, ch. 938, § 5.) The WRA has no term, as O'Gorman concedes. But even if the WRA terminated in 1959, as O'Gorman contends, O'Gorman points to nothing to suggest that section 1016 would have any effect on an agreement that was executed sixty years, and purportedly terminated forty years, before its enactment. As a general matter, California statutes operate prospectively only. (*Myers v. Philip Morris Cos., Inc.* (2002) 28 Cal.4th 828, 840.)

In her opening brief, and even though she did not raise this issue below, O'Gorman makes a cursory argument that in determining that she had no property right in Kimball Creek water, the trial court "ignored the impact" of Water Code sections 1706 and 1810. She contends that section 1706 applies to her as a "pre-1914 riparian rights" holder (apparently because she owns an upstream parcel with a spring that feeds Kimball Creek, the rights to which are not affected by the WRA), and allows her to move her point of diversion downstream to the Reservoir Parcel. She further contends that section 1810 allows her to use excess capacity in the City's water distribution system to sell her water to third parties. O'Gorman's argument consists primarily of assertions. It is notably devoid of citations to the record and citations to legal authority, and we can regard it as forfeited. (*Allen*, *supra*, 234 Cal.App.4th at p. 52.) But even if we reached it, we would find it unpersuasive. O'Gorman's pre-1914 riparian rights on the spring parcel mean only that she has the right to use water running through that parcel on her land. (*Phelps v. State Water Resources Control Bd.* (2007) 157 Cal.App.4th 89, 116.) Water Code section 1706 states that a "person entitled to the use of water by virtue of an appropriation other than under the Water Commission Act or this code [i.e., a pre-1914 appropriative right[6]] may change the point of diversion . . . if others are not injured by

[6] (*North Kern Water Storage Dist. v. Kern Delta Water Dist.* (2007) 147 Cal.App.4th 555, 559, fn. 1 ["procedure for establishment and regulation of rights to

such change." For the statute to apply, O'Gorman must have a pre-1914 appropriative right as well as a "point of diversion" that can be moved. O'Gorman has neither. An appropriative right requires putting water to beneficial use and is forfeited if the use ceases. (*Young v. State Water Resources Control Bd.* (2013) 219 Cal.App.4th 397, 404; Water Code, § 1240.) O'Gorman admits that she has not appropriated any Kimball Creek water since 1983, and that no facility owned by her or her predecessors in interest has transported Kimball Creek water since 1964, when the two-inch pipeline that had supplied the Home Place was damaged by fire.

In a scattershot reply brief, O'Gorman raises a number of new assertions and arguments, which we disregard. (*Provost*, *supra*, 201 Cal.App.4th at p. 1295.) Thus we do not address her claims that the WRA must be construed as a gift for the City's public use or as an easement to the City to be held in public trust, or that the Indenture provided that violations of the WRA would cause the right of way granted by the Indenture to revert to Tubbs's heirs. Nor do we address her attempt in the reply brief to relitigate the trial court's determination in *Reynolds* that the WRA did not run with the land. Not only is that issue raised for the first time on reply, but also it is contrary to the theory of her Second Amended Complaint. (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258 [operative complaint determines the issues a defendant must address to prevail on a motion for summary judgment].)[7]

In sum, we conclude that as a matter of law, O'Gorman cannot establish that she has the sole right to sell or convey water from Kimball Creek, nor can she establish that the rights the City acquired under the WRA have reverted to her. This dooms her claims

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appropriate water was adopted in the Water Commission Act (now incorporated, as amended, in the Water Code), which became effective in 1914"].)

[7] In her opening brief on appeal, O'Gorman does not dispute the trial court's determination in *Reynolds* that the WRA did not run with the land. To the contrary, she wholeheartedly embraces the position the City took in that case, that the WRA does not run with the land, and it is the linchpin of the theory underlying her Second Amended Complaint in this action. Further, for purposes of the summary judgment motion, O'Gorman stipulated that the WRA does not run with the land.

for inverse condemnation and injunctive and declaratory relief, and accordingly, the City is entitled to judgment on her complaint. We need not reach O'Gorman's argument that the trial court erred in agreeing with the City that O'Gorman cannot establish the damages that are prerequisite to an inverse condemnation claim. And because we affirm the trial court order on the merits, we need not address the City's arguments that O'Gorman's claims are barred by the statute of limitations or the doctrine of claim preclusion.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

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Miller, J.

We concur:

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Richman, Acting P.J.

_____
Stewart, J.

A150972, *O'Gorman v. City of Calistoga*